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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER ALVAREZ,

Defendant and Appellant.

B154541

(Los Angeles County  
Super. Ct. No. TA 060876)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Steven C. Suzukawa, Judge. Affirmed.

Nicholas F. Reyes for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Marc J.  
Nolan, Supervising Deputy Attorney General, and Beverly K. Falk, Deputy Attorney  
General, for Plaintiff and Respondent.

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Defendant Walter Alvarez timely appealed from his conviction on one count of assault with a deadly weapon by means likely to produce great bodily injury. The jury found the infliction of great bodily injury enhancement to be true. Defendant was sentenced to seven years in state prison, consisting of four years as the upper term for the offense, plus three years on the enhancement. Defendant raises various alleged errors, including improper admission of evidence and prosecutorial misconduct. We affirm.

### **FACTUAL BACKGROUND**

#### **I. Prosecution Case-in-Chief**

As of June 23, 2001, 18-year-old Santiago Nolasco lived with his family on Oakwood Avenue. Jorge Horo and his father Humberto Horo lived two doors away. Appellant lived about a block away. Nolasco knew appellant from school.

About four months prior to June 23, appellant confronted Nolasco and accused Nolasco of breaking his (appellant's) car windows. Nolasco denied breaking the windows. Appellant threatened to beat up Nolasco. Nolasco was afraid of appellant, who was bigger and older than Nolasco. Nolasco had not thrown a bottle at appellant when appellant was riding a bicycle two weeks earlier.

At about 2:30 p.m. on June 23, Nolasco, Jorge and Humberto were retrieving Humberto's pickup truck from the Horo driveway to transport chairs for a party to be held that day. Jorge backed his father's car out of the driveway because it was blocking the truck and drove the car around the block. Meanwhile, Humberto was sitting in the truck, and Nolasco was leaning on the passenger door. The truck, which was still partly in the driveway, was blocking the sidewalk. The truck was not blocking the street so as to impede traffic.

Appellant was driving a black car with one passenger. Appellant stopped his car behind Humberto's truck so that the truck could not back out of the driveway. Appellant

leaned toward the passenger side of his car and called to Nolasco, asking, ““What’s it all about?”” and ““What’s up, you little bitch?”” Nolasco tried to ignore appellant.

Nolasco turned and saw appellant get out of the driver’s side of his car. Appellant walked behind his car and toward Nolasco. Nolasco moved to the rear of the truck and stood with his back to the truck. Appellant punched Nolasco in the face a couple of times, and the two men started fighting. Nolasco ended up leaning on the right rear of appellant’s car with his head down while appellant held Nolasco and punched Nolasco’s side. Nolasco tried to hit appellant back.

It was clear to Jorge and Humberto that appellant was winning the fight, and they got out of their respective vehicles. Humberto got between appellant and Nolasco, and Jorge held appellant back.

Appellant’s passenger got out of the black car. Angrily and in a threatening tone, the passenger told Jorge to leave them alone and not get involved. Appellant also told Jorge to leave them alone and asked why Jorge was getting involved. Jorge asked appellant why he was coming there and “disrespecting” Jorge’s house. Appellant asked Jorge if he “wanted some, too,” lifted his pants slightly, held his fists in front of his waist with the knuckles up, and acted as if he were going to fight Jorge. Jorge simply stood still.

Appellant ran to the back of the truck and tried to pull something out. There was a lot of junk in the back of the truck. Nolasco went to the truck. Appellant let go of a plastic-coated stick in the truck bed, and Nolasco picked it up. Nolasco noticed appellant’s passenger had gotten out of the car. Nolasco was scared because there were now two people out of the car. Nolasco was afraid of appellant and swung the stick at appellant over the top of appellant’s car. Appellant moved, and the stick did not hit appellant, but it hit the top of the car.

Appellant went to the truck and got a rake with a wooden handle. Nolasco hit appellant’s passenger. The passenger did not fall down. Nolasco then saw appellant coming toward him, dropped the stick, and ran down the middle of the street toward his

house. Appellant chased Nolasco with the rake. Appellant held the rake with both hands like a baseball bat and swung the rake in an overhand motion, like a lumberjack chopping wood, and struck Nolasco in the head as Nolasco ran. Nolasco fell to the ground. A blade of the rake was stuck in Nolasco's head. Appellant looked, ran away, got into his car and drove off. As appellant drove off, he struck a car, but did not stop. Jorge noticed no injuries to appellant or his passenger.

When the rake was removed, Nolasco began bleeding profusely. Nolasco was taken to the hospital where he underwent surgery and remained for 18 days. As a result of his injury, Nolasco lost feeling on the right side of his body. At the time of trial, Nolasco still had a speech impediment and could no longer move his right hand. Nolasco sometimes forgets how to read and spell.

## **II. Defense Case**

Appellant testified he was acting in self defense and in defense of others.

On June 23, appellant was driving his car with Ricardo Correa as a passenger. Appellant stopped at Jorge's driveway to let the truck finish backing out. Nolasco walked up to the passenger window and said, "'Are you following me? What are you looking at? What do you want to do about it?'" Appellant replied, "'No. What do you mean? What are you talking about? You have a problem, or what?'"

Nolasco balled up his fist as if he were going to hit Correa. Appellant stepped out of his car to confront Nolasco and settle the matter; they met at the right rear fender of appellant's car. Appellant wanted to talk, but Nolasco swung at appellant, and they started to fight. Appellant pinned Nolasco against the trunk of the car. Nolasco was hitting appellant. The Horos told Nolasco to stop hitting appellant. Appellant let Nolasco go and walked away. Appellant stopped the fight because he knew he was stronger than Nolasco.

Appellant saw Nolasco grab a stick from the truck. Appellant started to run away and told the Horos to tell Nolasco to drop the stick. Nolasco chased appellant with the stick and hit appellant across the back with it. Appellant started to run faster. When appellant turned around and saw no one behind him, he started to walk back.

Appellant saw Nolasco run toward Correa and creep up behind Correa's back while Correa was arguing with Jorge. Appellant said, "Watch out, Rick." Nolasco swung the stick and hit Correa on the side of the head. Correa fell down to the ground. Appellant ran to help Correa. Appellant got an object from the truck for self-defense without knowing it was a rake. As soon as appellant reached Correa's location, Nolasco swung the stick at appellant twice and hit appellant on the back of his right arm with the first swing. Nolasco hit appellant three times. When Nolasco tried to hit appellant a fourth time, appellant hit Nolasco back to defend himself and to fend off the stick. Appellant did not swing with full force. Appellant saw Nolasco fall back stunned, and appellant took off. Appellant did not think he had hit Nolasco until he found out later that he had. Appellant had injuries on his arms.

About two weeks before this incident, appellant and Larry Silva were passing by Nolasco's yard on a bicycle. Nolasco was in the yard with his family. Appellant and Silva were laughing at a joke, not at Nolasco. Nolasco said, "What the fuck are you guys laughing at?" and threw a bottle at them. The bottle hit appellant and skinned his leg. Appellant did not want to fight anyone down the street from where he lived so he kept going and ignored Nolasco. Appellant had no prior incidents involving Nolasco. Appellant never had a problem about Nolasco breaking appellant's car windows and never confronted Nolasco about such an incident.

## **DISCUSSION**

### **I. The court properly admitted evidence of appellant's character for violence.**

#### **A. Background**

Nolasco testified that about four months prior to June 23, appellant had accused him of breaking the windows of appellant's car. Nolasco was cross-examined about the incident. Nolasco was then asked whether he had thrown a bottle at appellant two weeks prior to June 23. Nolasco testified he did not throw a bottle at appellant. Appellant testified that he had not had any problem with Nolasco breaking his car windows and that he had never confronted Nolasco about breaking the car windows. Appellant then testified Nolasco had thrown a bottle at appellant and Silva when they were riding a bicycle past Nolasco's yard. The prosecutor cross-examined appellant about the bottle-throwing incident.

The prosecutor then asked appellant if he had had a problem with Salvador Alvina (whom the prosecutor referred to as Andrade). At a sidebar, the prosecutor argued Evidence Code section<sup>1</sup> 1103, subdivision (b) allowed him to ask appellant about his character for violence as the defense attorney had opened the door by admitting evidence of an unrelated, irrelevant incident (i.e., the bottle throwing incident) the only purpose of which was to show the victim had a character trait for violence.

Defense counsel responded: "I didn't present any evidence of character trait for violence. I presented evidence introduced by the People initially, that there had been some confrontation between my client and the victim regarding someone having broken out the windows. He denied that. I asked him if there was some sort of issue that happened two weeks before to impeach him about there having been no previous contact with him and my client." The court ruled the evidence was admissible.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Evidence Code.

Appellant then denied approaching Alvina and challenging him to a fight and denied punching Alvina in the face with brass knuckles. Appellant testified he remembered the date of the incident and he was somewhere else. Subsequently, Alvina and his mother were brought into the courtroom. Appellant testified he did not know who Alvina was and had never seen Alvina before. Appellant denied trying to run over Alvina's mother with his car.

Alvina was called as a rebuttal witness. Alvina testified he had lived four houses away from appellant for 11 years and they had attended school together. Prior to December 30, appellant had spent four days in custody for trying to run over Alvina's mother. On December 30, Alvina was outside talking with a friend when appellant approached dressed in black with a long jacket and a covering over his face. Appellant said, "This is for fucking with me," and socked Alvina on the right side of his nose with brass knuckles causing a bleeding injury. Alvina recognized appellant's voice.

Jury instructions were given limiting the purpose for which Alvina's testimony could be considered.

## **B. Admissibility**

Appellant contends the court erred when it permitted the prosecutor to introduce evidence (i.e., Alvina's testimony) of appellant's character for violence after appellant testified that two weeks prior to the subject incident, he ignored Nolasco when Nolasco threw a bottle at appellant.

In relevant part, section 1103 provides:

"(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is:

“(1) Offered by the defendant to prove the conduct of the victim in conformity with the character or trait of character.

“(2) Offered by the prosecution to rebut evidence adduced by the defendant under paragraph (1).

“(b) In a criminal action, evidence of the defendant’s character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a).”

Appellant posits he correctly argued below that he did not intend to prove the victim’s (Nolasco’s) character for violence, rather “he only sought to show contrary to [Nolasco’s] statement that there had been previous contact with Appellant.” The difficulty with that argument is that Nolasco did not deny prior contact with appellant; as a matter of fact, although Nolasco denied throwing a bottle at appellant, he testified appellant had accused Nolasco of breaking the windows of his (appellant’s) car and then threatened to beat up Nolasco.

Appellant also suggests the bottle-throwing incident was not introduced as section 1103 evidence but as section 1101, subdivision (b) evidence, which does not allow such prosecution rejoinder. Defense counsel did not raise section 1101 below. On appeal, appellant argues the evidence he did not retaliate after the bottle incident countered the prosecution theory he had a motive because he had accused Nolasco of breaking his (appellant’s) car windows; however, appellant did not make that argument at the sidebar.

In *People v. Walton* (1996) 42 Cal.App.4th 1004, 1013-1015 disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, footnote 3, the defendant argued he had offered evidence he had seen the victim strike a woman pursuant to section



1101, not section 1103. The court rejected that argument because the defendant had not made that distinction in the trial court and because the distinction was unavailing. The court cited to a case in which the court rejected the defendant's argument he had not intended to prove the victim's character for violence, but had only sought to show his personal knowledge of the victim, because the defendant had raised the issue of self-defense and the evidence was directly probative of the victim's character for violence. (*People v. Walton, supra*, 42 Cal.App.4th at p. 1015.) Similarly, appellant raised the issue of self-defense and attempted to show that Nolasco was the aggressor. Thus, the evidence of the bottle-throwing incident was directly probative of Nolasco's character for violence on June 23, and there was no error in the introduction of the character evidence of defendant in rebuttal.

## **II. Appellant waived any claim the prosecutor committed misconduct when he cross-examined appellant about the credibility of other witnesses.**

### **A. Background**

After the prosecutor asked appellant if he had ever had any problems with Humberto, the following exchange took place:

“Q. Can you think of any reason why he would say that he saw you chase Santiago and hit him in the head?

“[Defense counsel]: Calls for speculation.

“The Court: Overruled.

“The Witness: If I know him?

“By [Prosecutor]:

“Q. Do you now know why he would come in here, swear to tell the truth, get up on the stand, and tell a lie on you?

“A. I don’t know why.

“Q. What about Jorge? He said that he saw the same thing. Can you think of any reason why he would come in here and tell a lie on you?

“A. They are friends. I don’t know.

“Q. They are friends. [¶] What about Humberto, the older guy?

“A. They are friends.

“Q. So everybody who testified that you hit him while he was running, what, didn’t tell the truth?

“A. No, I am telling you the truth, that he was not running. He was swinging at me.”

## **B. Misconduct**

Appellant contends the prosecutor committed prejudicial misconduct when, over his objection, the court permitted questions which required him to pass or comment on the credibility of other trial witnesses. Appellant objected to one question on the basis it called for speculation. Appellant did not object to any question on the basis that it was an improper question or that it constituted prosecutorial misconduct. “““[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.””” (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) Thus, appellant cannot now claim prosecutorial misconduct.

Citing two out-of-state cases, but no California authority, appellant argues it is improper to ask a defendant to opine on the veracity of other witnesses. However, appellant has waived any objection the questions were improper as he only objected to one question as calling for speculation. (See *People v. Williams* (1997) 16 Cal.4th 153, 206; § 353.)

**III. The prosecutor committed no misconduct by introducing rebuttal evidence of appellant's character for violence.**

Appellant contends the prosecutor committed prejudicial error by cross-examining him on collateral matters (the event involving Alvina and running over Alvina's mother) in order to elicit something to be contradicted or impeached. Appellant engages in an extensive discussion of why Alvina's testimony was not admissible under section 1101 as acts of misconduct cannot be admitted to show bad character and argues that testimony should have been excluded pursuant to section 352. However, as already discussed, the testimony was admissible pursuant to section 1103. To the extent appellant suggests that line of questions constituted misconduct, we have already rejected that argument. To the extent appellant is complaining the court did not weigh the probative value of the evidence against the prejudice as required by section 352, he has also waived that objection as he did not raise it below. (*People v. Williams, supra*, 16 Cal.4th 153, 206; § 353.)

**IV. Any error in the court's dual use of the fact of great bodily injury to impose the upper term and the enhancement was harmless.**

Appellant was sentenced to the upper term of four years for his conviction of assault with a deadly weapon by means likely to produce great bodily injury, plus three years on the great bodily injury enhancement. Appellant contends the court's dual use of the fact of great bodily injury to impose both the upper term and the enhancement

violated the prohibition against the dual use of facts found in Penal Code section 1170, subdivision (b).

The court found five circumstances in aggravation: (1) the victim was particularly vulnerable; (2) great violence, great bodily injury; (3) appellant's prior convictions were of increasing seriousness; (4) appellant was on probation; and (5) appellant was armed and used a weapon at the time of the offense. The court stated there were no circumstances in mitigation. In finding the high term was "definitely justified," the court also cited the facts the evidence showed appellant was spoiling for a fight, appellant had time to reflect, Nolasco was in full flight at the time he was hit with the rake, appellant showed no remorse and appellant denied knowing the individual he had previously assaulted even though appellant had entered a plea in that case in that courthouse.

Accordingly, it is not reasonably probable that a more favorable sentence would have been imposed if the court had not relied upon the contested factor. (See *People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1735-1736.)

### **DISPOSITION**

The judgment is affirmed.

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WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.